

11  
12 In Re: ) Docket No. 3:17-BK-3284 (LTS)  
13 )  
14 ) PROMESA Title III  
15 The Financial Oversight and )  
16 Management Board for )  
17 Puerto Rico, ) (Jointly Administered)  
18 )  
19 as representative of )  
20 )  
21 COFINA, )  
22 )  
23 Debtor, )

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2 In Re: ) Docket No. 3:17-BK-3566 (LTS)  
3 )  
4 ) PROMESA Title III  
5 The Financial Oversight and )  
6 Management Board for )  
7 Puerto Rico, ) (Jointly Administered)  
8 )  
9 as representative of )  
10 )  
11 Employees Retirement System )  
12 of the Government of the )  
13 Commonwealth of Puerto )  
14 Rico, )  
15 )  
16 Debtor, )

11  
12 In Re: ) Docket No. 3:17-BK-3567 (LTS)  
13 )  
14 ) PROMESA Title III  
15 The Financial Oversight and )  
16 Management Board for )  
17 Puerto Rico, ) (Jointly Administered)  
18 )  
19 as representative of )  
20 )  
21 Puerto Rico Highways and )  
22 Transportation Authority, )  
23 )  
24 Debtor, )

1  
2 In Re: ) Docket No. 3:17-BK-4780 (LTS)  
3 )  
4 ) PROMESA Title III  
5 The Financial Oversight and )  
6 Management Board for )  
7 Puerto Rico, ) (Jointly Administered)  
8 )  
9 as representative of )  
10 )  
11 Puerto Rico Electric )  
12 Power Authority, )  
13 )  
14 Debtor, )

10  
11 In Re: ) Docket No. 3:19-BK-5523 (LTS)  
12 )  
13 ) PROMESA Title III  
14 The Financial Oversight and )  
15 Management Board for )  
16 Puerto Rico, ) (Jointly Administered)  
17 as representative of )  
18 )  
19 Puerto Rico Public )  
20 Buildings Authority, )  
21 )  
22 Debtor, )

## OMNIBUS HEARING

21 BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN  
22 UNITED STATES DISTRICT COURT JUDGE  
23 AND THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN  
24 UNITED STATES DISTRICT COURT JUDGE

1 APPEARANCES:

2 For The Commonwealth  
3 of Puerto Rico, et al.: Mr. Martin J. Bienenstock, PHV  
4 Ms. Laura Stafford, PHV  
5 Mr. Michael A. Firestein, PHV  
6 Mr. Lary A. Rappaport, PHV  
7 Mr. Michael T. Mervis, PHV  
8 Mr. Steve Ma, PHV  
9 Ms. Hadassa R. Waxman, PHV  
10 Mr. Timothy W. Mungovan, PHV

11 For the Official  
12 Committee of Unsecured  
13 Creditors: Mr. G. Alexander Bongartz, PHV

14 For the Puerto Rico  
15 Fiscal Agency and  
16 Financial Advisory  
17 Authority: Mr. Peter Friedman, PHV  
18 Mr. John Rapisardi, PHV  
19 Mr. William Sushon, PHV

20 For Mr. Hein: Mr. Peter Hein, Pro Se  
21 Appear from New York

22 For Special Claims  
23 Committee: Mr. Tristan G. Axelrod, PHV  
24 Appear in New York

25 For Salud Integral  
en la Montana: Mr. John E. Mudd, Esq.

26 For National Public  
27 Finance Guarantee Corp.: Mr. Robert Berezin, PHV  
28 Appear from New York

29 For Cobra Acquisitions  
30 LLC: Mr. Stephen M. Baldini, PHV  
31 Appear from New York

32 For QTCB Noteholder  
33 Group: Mr. Kurt A. Mayr, PHV  
34 Mr. David L. Lawton, PHV

35 For Vitol Inc.: Mr. Alexander L. Kaplan, PHV

36 Proceedings recorded by stenography. Transcript produced by  
37 CAT.

	I N D E X	
		PAGE
1		
2	WITNESSES:	
3	None offered.	
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5	EXHIBITS:	
6	None offered.	
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1 San Juan, Puerto Rico

2 March 5, 2020

3 At or about 9:36 AM

4 \* \* \*

5 THE COURT: And so we are continuing into the second  
6 day of the March Omnibus hearing in these Title III  
7 proceedings. According to my Agenda, the next item is the  
8 PBA's motion to set the bar date.

9 MR. MA: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. MA: Steve Ma, from Proskauer, for the Oversight  
12 Board.

13 THE COURT: Good morning, Mr. Ma.

14 MR. MA: If I may, I'd like to address the Court's  
15 concerns addressing the foot traffic at the courthouse  
16 collection sites that the Court had expressed yesterday with  
17 the ERS presolicitation motion that I believe carries over to  
18 the PBA bar date motion.

19 THE COURT: Yes.

20 MR. MA: Currently there are six proposed locations,  
21 which include three courthouses: This District Court in San  
22 Juan, the Bankruptcy Court in Old San Juan, and the Bankruptcy  
23 Court in Ponce. And then there are three other noncourt  
24 locations, including City Towers, which is approximately a  
25 ten-minute walk from this courthouse; a location in Anasco;

1 and Caguas.

2 Our proposal to address the Court's concern regarding  
3 the foot traffic is, first, in the notices to the bar date and  
4 the ERS presolicitation, to not include the courthouses. And,  
5 second, to expand the location at City Towers near this  
6 courthouse to accept greater foot traffic. And, third, to  
7 find alternative locations in Old San Juan and Ponce near the  
8 Bankruptcy Courts. And I would note that this process has  
9 already started, but it may take a couple days to finalize  
10 those locations.

11 And then finally, Prime Clerk would continue to work  
12 with the Clerk's Offices in the District Court and the  
13 Bankruptcy Courts, so that the Clerk's Office can nonetheless  
14 accept Proof of Claim forms or information forms for  
15 individuals that just happen to submit them at the courthouse.

16 THE COURT: Well, I appreciate these thoughtful  
17 additional arrangements. If you'll give me just one second.

18 May I consult off-line with my Clerk's Office  
19 representative?

20 (Discussion held off the record between the Court and  
21 the Courtroom Deputy.)

22 THE COURT: Once again, we are very grateful for your  
23 accommodation of the concerns of the Court and making sure  
24 that there will be sufficient locations and support staff at  
25 locations to help the people who are coming.

1                   And so the arrangements, as you have outlined them,  
2 sound like they will work well. I'll just ask that before  
3 finalizing, you touch base with the appropriate court  
4 personnel and make sure that they're able to communicate with  
5 the Prime Clerk people to make sure there's sufficient  
6 materials here and everybody knows what everybody else is  
7 doing.

8                   And so with those emendations, I grant the motion,  
9 and I will await the revised Proposed Order and materials.  
10 And I think we are still in the process of having the court  
11 interpreters unit review the Spanish language version, and  
12 we'll get back to you with any suggestions or concerns that we  
13 have about that --

14                   MR. MA: Of course.

15                   THE COURT: -- before it's all finalized as well.

16                   MR. MA: Of course. And I would just note that these  
17 changes would also carry forward to the solicitation  
18 procedures and the proposed collection sites for those.

19                   THE COURT: That was my hope. Thank you.

20                   MR. MA: Thank you.

21                   THE COURT: Thank you so much.

22                   Next on the Agenda we have the uncontested claim  
23 objections. Good morning, Ms. Stafford.

24                   MS. STAFFORD: Good morning. Laura Stafford, for the  
25 record, of Proskauer Rose on behalf of the Oversight Board.

1                   As to the next several uncontested items on the  
2 Agenda, in each instance we received a number of responses,  
3 which were adjourned to the April 22nd Omnibus hearing  
4 pursuant to notices of adjournment that were filed by the  
5 debtors last Wednesday and last Friday.

6                   In the intervening period between last Friday and  
7 today, we've continued to receive responses on the docket, as  
8 well as mailing responses that were sent to Prime Clerk --

9                   THE COURT: Can you slow down just a touch?

10                  MS. STAFFORD: Sure.

11                  THE COURT: Thank you.

12                  MS. STAFFORD: -- the debtors or the UCC. And  
13 consistent with what we have done at the December hearing and  
14 January hearing, we would like to adjourn the hearings as to  
15 those claimants who filed responses or submitted supplemental  
16 mailings until the April 22nd Omnibus hearing, and only with  
17 respect to those who submitted their supplemental mailings or  
18 their responses as of today's date, March 5th. And would  
19 request that the Court grant the objections to those claimants  
20 who have not filed responses with the Court as of today.

21                  THE COURT: That request is granted. And so the --  
22 just one moment. Okay. I'm trying to think of an efficient  
23 way to do this.

24                  So Agenda Items IV.3 to 13, which is the 124th  
25 through 134th Omnibus Objections, the objections are sustained

1 as to all claims for which there has been no response to the  
2 objection. And I will await a proposed order that is current  
3 up through the date of today's hearing.

4 And then as to Agenda Items IV.14 through 27, which  
5 is the 135th through 148th Omnibus Objections, the result is  
6 the same. It is sustained as to all objections to all claims  
7 as to which there has not been a response.

8 And as to Agenda Items 28 through 32, which is the  
9 149th, 150th, and 155th through 157th Omnibus Objections,  
10 those objections are sustained as to claims that have not  
11 elicited a response to the Omnibus Objection. And the Court  
12 will await amended proposed orders covering all claims falling  
13 into that category up through today. And the remainder as to  
14 which there have been responses are adjourned to the April  
15 Omnibus hearing.

16 MS. STAFFORD: Thank you very much, Your Honor.

17 THE COURT: Thank you.

18 The next item on our Agenda is oral argument as to  
19 Law 29. And what are the time allocations?

20 MS. WAXMAN: Good morning, Your Honor.

21 THE COURT: Good morning, Ms. Waxman.

22 MS. WAXMAN: Hadassa Waxman, Proskauer Rose, for the  
23 Board.

24 Your Honor has allocated a total of 30 minutes. I'd  
25 like to reserve three minutes for rebuttal, if the Court

1      permits.

2                   THE COURT: So you're down for 12 and 3?

3                   MS. WAXMAN: Yes. Thank you, Your Honor, very  
4                   much.

5                   THE COURT: Thank you.

6                   MS. WAXMAN: Good morning.

7                   THE COURT: Good morning.

8                   MS. WAXMAN: In a filing of Friday night, AAFAF noted  
9                   that this case strikes at the heart of the relationship  
10                   between the Oversight Board and the government. Your Honor,  
11                   the Board agrees. As Your Honor and the First Circuit have  
12                   recognized, as well as counsel during the hearing, the Board  
13                   and the government must work together cooperatively.

14                   This is critical for the restructuring process, for  
15                   the Commonwealth's residents, and for the future of Puerto  
16                   Rico itself. PROMESA, of course, codifies this power-sharing  
17                   structure, and imposes on the government certain disclosure  
18                   and approval obligations. These obligations ensure that the  
19                   Board is aware of the government's actions as it relates to  
20                   the Commonwealth's finances. And they also allow the Board to  
21                   prevent the government from taking actions that undermine the  
22                   carefully crafted fiscal plan, the budgets, and PROMESA  
23                   itself.

24                   So before the government reprograms, before the  
25                   government modifies debt and so forth, it must inform the

1      Board of the impact, and it must obtain Board approval.  
2      Before the government enacts a new law, it must provide timely  
3      and accurate formal certifications, formal estimates and  
4      certifications as to whether or not the law is significantly  
5      inconsistent with the Fiscal Plan.

6                    And, Your Honor, that is why we are here. We are  
7      here because the defendants have not adhered to PROMESA's  
8      requirements. In passing Law 29, the joint resolutions and  
9      the other laws, they went at it alone. They took action that  
10     had a massive impact on the Fiscal Plan and the budgets  
11     without seeking the Board's approval and without submitting  
12     the required documentation that would have allowed the Board  
13     to do a meaningful analysis. And that undermines the Fiscal  
14     Plan, and fundamentally, it impairs and defeats the purposes  
15     of PROMESA.

16                   Now, for quite some time, the Board has made efforts  
17     to work with the government, but with respect to Law 29 and  
18     the joint resolutions, these efforts have not resulted in  
19     compliance. These measures have had and will continue to have  
20     a significant and negative impact on the Fiscal Plan. And the  
21     Board, therefore, had no choice but to file this lawsuit  
22     asking the Court to nullify Law 29 and the joint resolutions,  
23     and to issue injunctions preventing the defendants from  
24     repeating their conduct and compelling them to comply with  
25     PROMESA.

1                   Now, as Your Honor is aware, the parties were last  
2 before the Court this summer on this matter on the defendants'  
3 Motion to Dismiss. The Court denied the motion in its  
4 entirety, finding that the Oversight Board had asserted viable  
5 claims. And because there are no material facts in dispute,  
6 because the government has violated PROMESA as a matter of  
7 law, the Board brings this Motion for Summary Judgment and  
8 respectfully requests that Your Honor grant the Board's motion  
9 on all counts.

10                  Now, if Your Honor --

11                  THE COURT: I'm sorry. So are you still pressing  
12 your request as to the policy of noncompliance?

13                  MS. WAXMAN: We are, Your Honor. Would you like me  
14 to address that first? I can walk through the counts, count  
15 by count, or I can address the policy argument first,  
16 whichever Your Honor would prefer.

17                  THE COURT: You can get there count by count, as long  
18 as you address that.

19                  The two other things that I want to be sure that you  
20 address are the government's argument that the significance of  
21 noncompliance and/or the characterization of Law 29 as  
22 reprogramming both implicate factual issues, which are not  
23 addressed as such in the record. And the other is to the  
24 extent PROMESA gives the Board the ability to determine  
25 whether something is inconsistent with the purposes of

1     PROMESA, is there a standard of review for this Court of the  
2     Board's determination since there is no 106 type provision  
3     telling the Court to stay out of the Board's business?

4                   MS. WAXMAN: And that's with respect to 204(a)?

5                   THE COURT: Yes.

6                   MS. WAXMAN: That was Your Honor's question. Okay.

7     Certainly I will get to both. I will just march through count  
8     by count and get to both of those issues.

9                   THE COURT: Thank you.

10                  MS. WAXMAN: Thank you, Your Honor.

11                  So let's first talk about reprogramming, Your Honor,  
12     which we assert in Counts III and IV of the Complaint. With  
13     respect to those counts in which the Board seeks an injunction  
14     prohibiting the enforcement of Law 29 and a declaratory  
15     judgment that Law 29 and the joint resolutions are  
16     enforceable for the defendants' failure to comply with  
17     PROMESA, 204(c), again, the reprogramming count, there's no  
18     dispute that the 2019 Fiscal Plan is predicated on the  
19     assumption that the municipalities will reimburse the  
20     Commonwealth for outlays of pension and health care costs.  
21     And there's no dispute that Law 29 blows a massive hole in  
22     that assumption by relieving the municipalities of all  
23     reimbursement obligations entirely.

24                  So together, Law 29 and the joint resolutions will  
25     cost the Commonwealth hundreds of millions of dollars. And

1      there is no dispute that this is not accounted for in the  
2 certified budgets or in the fiscal plan. There is also no  
3 dispute that the government did not seek or obtain Board  
4 analysis under 204(c) before enacting either Law 29 or the  
5 joint resolutions.

6                   So notwithstanding these undisputed facts, the  
7 defendants contend that Law 29 and the joint resolutions do  
8 not violation 204(c) for two primary reasons. First, they  
9 argue that 204(c) applies only to reprogramming initiated by  
10 the Governor. And, second, the defendants argue that Law 29  
11 doesn't actually reprogram.

12                   And if I may address both of those arguments, Your  
13 Honor. We've addressed them in our papers, but I'd like to  
14 highlight a few points here, if Your Honor permits.

15                   So let's first look at the statute. 204(c)(2) says  
16 simply the legislature shall not reprogram. It's plain and  
17 simple. And in the Board's view, the inquiry should end  
18 there, and that's how it has to be. PROMESA would be defeated  
19 if the legislature were permitted, able to reprogram in total  
20 disregard of the Fiscal Plan and budgets.

21                   For the Oversight Board to do its job, for PROMESA to  
22 work as Congress intended it, the Board must have the  
23 authority to analyze, review and approve, or reject if  
24 appropriate, reprogramming regardless of which branch of  
25 government initiates it.

1                   Now, with respect to defendants' argument that Law 29  
2 does not reprogram but only contemplates reprogramming, that  
3 is just wrong. And I think that Your Honor alluded to that in  
4 the Motion to Dismiss in which Your Honor states, quote, Funds  
5 otherwise committed for other purposes will necessarily have  
6 to be redirected. And in our view, that's the definition of  
7 reprogramming.

8                   As Your Honor and the First Circuit has recognized,  
9 and it's certainly the Board's view, each and every dollar in  
10 the budget is accounted for. This was not accounted for in  
11 the budget. It was not accounted for in the Fiscal Plan. By  
12 definition, money has to be taken from other places. And  
13 that, in the Board's view, is reprogramming in violation of  
14 204(c) given that there was no approval sought in advance.

15                  With respect to the joint resolution, the defendants  
16 claim that the Board's claims are moot because the  
17 Commonwealth has already spent the funds. And respectfully,  
18 Your Honor, the defendants are wrong there as well.

19                  If the defendants believe that they can reprogram  
20 very quickly before the Board can take action, they will be  
21 incentivized to do so over and over again, making the injury  
22 capable of repetition. And, therefore, this controversy is  
23 certainly ripe for the Court's review.

24                  Now, if I may move on to 207, Your Honor, which  
25 addresses the issue of modification of debt. With respect to

1     Count II, in which the Board seeks an injunction prohibiting  
2     the enforcement of Law 29 and a declaratory judgment that Law  
3     29 is unenforceable for the defendants' failure to comply with  
4     207, there is no dispute that Law 29 relieves the obligations  
5     of the municipalities in relation to their employees'  
6     retirement and health care costs and imposes these obligations  
7     entirely on the Commonwealth without any right of  
8     reimbursement. This is, by definition, modification within  
9     the ordinary meaning.

10           So the only open question for this Court, in the  
11     Board's view, is whether this is debt within the meaning of  
12     207. And we would submit, of course, it is. As an initial  
13     matter, the word "debt" should be given its ordinary meaning.  
14     So what is debt? Debt is an obligation. And clearly the  
15     Commonwealth's obligation to pay pension and health care costs  
16     is a debt.

17           Defendants argue that Law 29 does not apply  
18     because -- excuse me -- 207 does not apply to Law 29 because  
19     207 says nothing about legislation. And respectfully, to  
20     counsel, this is really not a serious argument in the Board's  
21     view. Debt obligations, as a general matter, emanate from  
22     legislation. So if Congress did not want 207 to apply to  
23     legislation, they would have written that exemption into the  
24     statute. And the statute would have been entirely  
25     meaningless, and 207 would not exist.

1                   By virtue of it existing on the books makes clear  
2 that it applies to legislation.

3                   THE COURT: And I take it you continue to read the  
4 reference to issuance as disjunctive in relation to later  
5 references in the statute to modification?

6                   MS. WAXMAN: Yes, we do, Your Honor.

7                   If I just may address that for a moment? Because  
8 defendant obviously raises that in their opposition to our  
9 Motion for Summary Judgment. The Court observed, of course,  
10 in the Motion to Dismiss, that the statute's provisions  
11 requiring approval of guarantees and modifications refer more  
12 generally to Commonwealth debt without the modifier  
13 restricting such debt to that incurred in market-based  
14 transactions.

15                  Interpreting 207 to apply to issued debt only would  
16 be inserting a limitation that Congress simply didn't put in  
17 there. It would be ignoring the text of the statute. And  
18 it's the Board's view that that modifier cannot be read in  
19 with respect to the text of the actual statute.

20                  Now, if I may move on to Counts I and III, which  
21 focus on 204(a), the provision, of course, requiring the  
22 Oversight Board to review legislation. There we seek an  
23 injunction prohibiting the enforcement of Law 29, a  
24 declaratory judgment that Law 29 is unenforceable for the  
25 defendants' failure to comply with PROMESA.

1                   There is no dispute the Governor's formal estimate  
2 covers only a single year. And as we've argued in our papers,  
3 Your Honor, we believe that the government's responsibility is  
4 to give an estimate that requires -- that covers the full five  
5 years of the fiscal plan. They didn't do that here. And  
6 there's no dispute that the Board notified the defendants of  
7 their faulty and inadequate formal estimate, and they did  
8 nothing. They simply did not answer.

9                   The government asserts many legal arguments or  
10 several legal arguments to address. And I see that I'm  
11 running out of time, so I want to just sort of move on as  
12 quickly as I can.

13                  THE COURT: Yes.

14                  MS. WAXMAN: But with respect to the argument that  
15 the Governor's certification is immune for Oversight Board  
16 challenge, I would say there, Your Honor, I don't want to  
17 spend any time on that. The Court's addressed that. And the  
18 defendants offer no legitimate basis for a reconsideration of  
19 that.

20                  THE COURT: And I am familiar with the briefs, but I  
21 do want you to talk about the -- whether the Court can and  
22 under what standard it would evaluate the Board's assertion  
23 that something is inconsistent with PROMESA and therefore --

24                  MS. WAXMAN: So, Your Honor, I think it's the  
25 Board -- we moved on 204(a) for the government's failure to

1 provide a formal certification. We don't think that the Court  
2 has to reach the issue of whether or not it's -- the Law 29 is  
3 significantly inconsistent with the Fiscal Plan. We say that  
4 under 204(a), the Board, the Governor -- there should be an  
5 injunction and a nullification with respect to Law 29 because  
6 of the failure of procedure.

7 If the Court is inclined to reach the insignificant  
8 inconsistency issue, which again, it's the Board's view that  
9 we don't have to --

10 THE COURT: I'm talking more really about 108(a)(2).

11 MS. WAXMAN: Oh, I'm sorry, Your Honor.

12 THE COURT: The determination by the Board that --  
13 well, the invocation by the Board of the prohibition on  
14 enacting statutes or rules that would impair or defeat the  
15 purposes of the Act as determined by the Oversight Board.

16 MS. WAXMAN: Sorry, Your Honor. May I consult with  
17 my colleague? Thank you.

18 Your Honor, the Board's view of that standard is that  
19 the Court would be able to review it under an arbitrary and  
20 capricious standard. 108(a)(2), we believe, empowers the  
21 Board to determine whether the government has acted in a way  
22 that impairs or defeats PROMESA. And the Court would be able  
23 to review that based on an arbitrary and capricious standard.  
24 And --

25 THE COURT: Thank you. One further question. And

1       you're on my clock now.

2            MS. WAXMAN: Okay.

3            THE COURT: You've asked for essentially the same  
4 relief in count eight, Counsel, with the exception of the  
5 declaration of the policy.

6            MS. WAXMAN: Correct.

7            THE COURT: But you have asked in the other seven  
8 counts for essentially the same relief in enjoining, declaring  
9 null and void, Law 29 and the Joint Resolutions. Is there a  
10 reason that I have to rule on every one of your grounds, since  
11 if I rule in favor of you on one, you have achieved that  
12 relief?

13           MS. WAXMAN: I don't think, as a matter of law -- I  
14 think that the point of this lawsuit is for Your Honor to  
15 invalidate Law 29 and the joint resolutions. I think  
16 obviously the Board would like Your Honor to rule for us on  
17 all counts. I think that if you decided to rule on one count,  
18 as opposed to other counts, I think it would achieve the  
19 purposes that we would have sought to achieve in this case.

20           THE COURT: And finally, as to the policy, since the  
21 new Governor has put in an executive policy that urges  
22 everyone to be good --

23           MS. WAXMAN: Yes.

24           THE COURT: -- and has, in fact, sped up the process,  
25 why is an injunction necessary?

1 MS. WAXMAN: Your Honor, certainly things are better,  
2 and we have to recognize that. This new administration has  
3 improved compliance. That's certainly true. And the Board is  
4 very pleased with the efforts of the new Governor. The new  
5 Governor is certainly engaging with the Board, and that's  
6 definitely a good thing.

7 But the situation is not perfect, and more work needs  
8 to be done. Since summary judgment was filed, 21 of the 57  
9 certifications were late. That's 36 percent of the  
10 certifications were late. And in addition, today's compliance  
11 does not excuse what happened years ago or what happened over  
12 the past number of months.

13 THE COURT: But you don't punish past closed conduct  
14 by issuing an injunction.

15 MS. WAXMAN: Certainly. That is true, Your Honor.

16 However, the situation is not perfect.

17 Certifications are still late. It is true that the Governor  
18 improved after we put their feet to the fire. And what our  
19 concern is, is that the absence of an injunction would cause  
20 the defendants to fail to comply once more if things got, in  
21 their view, too difficult.

22 Their brief spent a lot of time talking about how  
23 difficult it is to comply and the efforts that they've made,  
24 which we certainly appreciate. But we are very concerned that  
25 this is the kind of harm that is capable of repetition and is

1     indeed continuing to occur even as of today when their  
2 certification is still -- a smaller percentage of  
3 certifications remain late.

4                     THE COURT: Thank you.

5                     MS. WAXMAN: And if the Court has no additional  
6 questions, the government or the Oversight Board respectfully  
7 rests on its written submissions and the oral arguments made  
8 today.

9                     THE COURT: Thank you.

10                    MS. WAXMAN: Thank you, Your Honor.

11                    THE COURT: Good morning.

12                    MR. SUSHON: Good morning, Your Honor. Bill Sushon  
13 on behalf of O'Melveny & Myers on behalf of the Governor and  
14 AAFAF.

15                    Before I begin, if I may, I'd like to hand up copies  
16 of two letters that I may refer to during the course of my  
17 argument. I've shown them to opposing counsel, and she said  
18 they have no objection.

19                    THE COURT: Yes. Please bring them forward.

20                    MR. SUSHON: Thank you.

21                    THE COURT: Thank you.

22                    Okay. The other copy can go to my law clerks and --

23                    MR. SUSHON: I'm sorry, Judge.

24                    THE COURT: Thank you. And then kindly file them  
25 with an informative motion --

1                   MR. SUSHON: We will, Your Honor.

2                   THE COURT: -- because of course the people on the  
3 phone and the people in New York wouldn't have been able to  
4 see them.

5                   MR. SUSHON: Yes, Your Honor. Thank you.

6                   Your Honor, as the party opposing summary judgment,  
7 ordinarily I would focus on what's disputed. This morning,  
8 I'm going to focus on what's undisputed.

9                   First of all, there is no dispute that there has been  
10 tremendous improvement in PROMESA compliance under the Vazquez  
11 administration, and that the time to get 204(e) certifications  
12 to the Board on average has been reduced to almost exactly the  
13 seven days that the statute provides. Second, there's no  
14 dispute, they don't dispute it in their papers and they  
15 haven't disputed it today in argument, that PROMESA is an  
16 antidemocratic law designed to take power from the people of  
17 Puerto Rico and put it in the hands of an Oversight Board.

18                   When you take those two things and combine them with  
19 other concessions that the Board has made in its brief, the --  
20 it becomes clear that the sole yard stick the Court should use  
21 to evaluate Act 29 is Section 204(a) of PROMESA. And that's  
22 all that's necessary.

23                   There's also no dispute, Your Honor, that --

24                   THE COURT: All that's necessary or all that Congress  
25 has made available to the Board in carrying out its duties?

1                   MR. SUSHON: Well, actually both, Your Honor. In  
2 terms of invalidating Act 29, and in terms of the joint  
3 resolutions, it's our position that 204(a) is the sole  
4 yardstick that the Court should employ and that they're  
5 entitled to invoke here.

6                   There's also no dispute that the Commonwealth's  
7 municipalities are in dire financial circumstances, Your  
8 Honor. And the Oversight Board's solution to that has been to  
9 impose on them hundreds of millions of dollars in PayGo  
10 obligations and in health care obligations, while at the same  
11 time stripping them of the funding that they were receiving  
12 from the central government to help cover their costs and  
13 expenses.

14                  The only help the Oversight Board has offered so far  
15 is to say that they should be more efficient in collecting  
16 taxes and more efficient in providing services. The  
17 government recognizes that there are hard choices that have to  
18 be made, Your Honor, but this starve the beast mentality  
19 applied here to the Commonwealth's municipalities just isn't  
20 working. And it's putting them at risk of being unable to  
21 provide basic services, such as sanitation and firefighting,  
22 to the citizens. And the situation has only become more dire  
23 in the wake of the earthquakes that have struck in the new  
24 year. And some of the hardest hit municipalities by the  
25 earthquakes are also the ones that need the government's

1      funding the most.

2              Now I'd like to start --

3              THE COURT: And so as a legal matter, when situations  
4 get really, really bad, everyone understands that the  
5 situation is dire and there is a financial problem that has to  
6 be addressed in some way if the elected government  
7 fundamentally disagrees with the manner in which the Oversight  
8 Board proposes to address it in carrying out its functions.

9              There's a point at which the elected government and the  
10 Governor can just say, okay, forget it, Oversight Board; we're  
11 going our own way; you stay in the other room; and you can't  
12 do anything about it?

13              That seems, you know, certainly inconsistent with the  
14 spirit and the structure of PROMESA, you know, not to mention  
15 some specific statutory provisions.

16              MR. SUSHON: That's not our position, Your Honor.

17              As Your Honor has pointed out, PROMESA is an awkward  
18 power-sharing arrangement. The Board does have tools  
19 available to it to address the situation if the government is  
20 going off the rails, to bring it back into compliance. And  
21 those include 204(a); they include 202 in the budgetary  
22 powers; 201 in the fiscal plan powers; and most importantly,  
23 203, which allows the Board, in certain circumstances, to  
24 reduce spending to bring it in line with the certified budget.

25              What is happening here is that the Board is trying to

1      use other statutory powers under PROMESA, that don't apply to  
2      this situation, to just cut off the government's ability to  
3      even begin to try to have a dialogue about these issues and to  
4      work through them.

5              I think Your Honor understands the strong policy of  
6      compliance that the new administration has put in place. I  
7      won't belabor it. I will just say that under Executive Order  
8      2019-57, as Mr. Marrero made clear in his sworn declaration,  
9      the average time for submitting 204(a) certifications has  
10      plummeted, and it now stands at only slightly above the  
11      seven-day deadline.

12              There's no dispute as to that fact, Your Honor.  
13      Instead, what the Board has done is to try to turn virtue into  
14      vice. They've said, well, there's still not compliance with  
15      the 204(a) certification requirements, and they raised one law  
16      wherein they said that there was no certification given. That  
17      was and that is mentioned in the December 4th letter that I've  
18      handed up to Your Honor. They say that -- I'm sorry. The  
19      joint resolution 118-2019 had no certification as of the time  
20      they filed for summary judgment. That was true.

21              As the Marrero declaration made clear -- it was  
22      submitted on December 26, which was late. But as this letter  
23      shows, the government asked for an extension of time to submit  
24      the certification, and the Oversight Board said no extension.  
25      And that's on page two. Accordingly, no more extensions of

1      time will be granted. They didn't offer any real explanation  
2      as to why they weren't giving the extension. They just didn't  
3      give the extension.

4              The other instances of noncompliance that the Board  
5      has pointed out are Act 156-2019 and joint resolution  
6      116-2019, both of which they say reprogrammed funds without  
7      getting advance Board permission. First of all, Act 156-2019  
8      involves restoring vacation days to firefighters and certain  
9      other government employers who are in dangerous professions.  
10     As the December 18th letter I've given up to Your Honor shows,  
11    the government did submit that to the Board with a  
12    certification that said that the law was -- and this is on  
13    page two, the third paragraph -- that Act 156-2019 is  
14    significantly inconsistent with the fiscal plan.

15              So this is an example of the policy working. The  
16    Government said it's significantly inconsistent, Board.  
17    Here's our certification, Board. They weren't trying to hide  
18    anything from the Board or put anything over on the Board.

19              And the same applies with respect to the joint  
20    resolution at issue, where if you look at page three of the  
21    letter, it's clear that the government again certified that it  
22    was significantly inconsistent with the fiscal plan, "Because  
23    it relates to a legislative appropriation granted in a  
24    previous fiscal year, and the Oversight Board has not approved  
25    the reprogramming of the funds." Again, there's no effort to

1      hide the ball here, Your Honor. The government is complying,  
2      not failing to comply.

3                    And then the only other thing that the Board points  
4      to, Your Honor, is the fact that they were concerned about  
5      noncompliance before, and that it could happen again. Your  
6      Honor, that's pure speculation on their part, and that can't  
7      be the foundation for an injunction against a compliant  
8      government that has a compliant policy. That just can't be  
9      the basis for an injunction, Your Honor. So --

10                  THE COURT: And is that your argument as well with  
11      respect to their response to your mootness argument on  
12      implemented joint resolutions?

13                  MR. SUSHON: It is, Your Honor.

14                  There has now been compliance with 204(c). As we've  
15      just seen, there are only two instances that they could point  
16      to where they said there was not compliance with 204(c). And  
17      in both instances, when the government submitted the new law  
18      or the new joint resolution, the government certified it as  
19      significantly inconsistent with the Fiscal Plan.

20                  So I'd like to turn to the other sections under which  
21      the Board is seeking relief. As I said, the Board does not  
22      dispute that PROMESA is antidemocratic, and it can't dispute  
23      that fact. Again, it takes the power from the elected  
24      government that the people of Puerto Rico chose and puts it in  
25      the hands of a Board appointed, chosen by the President of the

1   || United States, and whose election the people of Puerto Rico  
2   || have no say, Your Honor.

3 THE COURT: And the Board didn't enact PROMESA.

4 Congress did.

5 MR. SUSHON: Correct, Your Honor. But because it is  
6 an antidemocratic law, the Board's powers under PROMESA should  
7 be construed as narrowly as possible to effectuate their ends.

8                   The Board disputes that. The Board wants the Court  
9 to endorse autocracy. The Board thinks that the  
10 antidemocratic nature of PROMESA is not a vice but a virtue.  
11 And that's just not the way that it should be read, Your  
12 Honor. It should be read as narrowly as possible to preserve  
13 to the democratically elected government the powers that it  
14 has, while ensuring that PROMESA's aims can be achieved.

15 So in this circumstance today, Section 204(a) really  
16 should be the only law that applies. With respect to Sections  
17 108(a)(2) and Section 207, if the Court were to adopt the  
18 Board's interpretations of those statutes, it would completely  
19 nullify Section 204(a). In fact --

20 THE COURT: You will really need to walk me through  
21 that assertion, because I didn't really follow it in your  
22 brief. And 204(a), if complied with, works fine. Your  
23 argument and your brief on 204(a) seemed to be, well, if  
24 ultimately we don't say anything at all or we don't respond or  
25 we say it's consistent, and even if it's objectively

1     inconsistent, well, you know, the Board's gotten a response.  
2     And it's an awkward power-sharing arrangement, so, you know,  
3     the Board should stand aside and not do anything else. So I  
4     don't get it yet.

5                    MR. SUSHON: Okay. With respect to -- let's start  
6     with Section 108(a)(2) and the Board's interpretation of  
7     Section 108(a)(2). The Board's argument has been that it has  
8     the power to bar enactment of a statute with the only  
9     prerequisite that the Board determine in its sole discretion  
10    that the statute in question impairs and/or defeats the  
11    purposes of PROMESA.

12                  Now, for the first time today, I finally heard some  
13    limitation on that power. They now concede that Your Honor  
14    can review that for being arbitrary and capricious, which is  
15    an incredibly, incredibly deferential standard, and leaves it  
16    to the Court only to find that the Board has overstepped its  
17    powers if it has acted in an unreasonable, completely  
18    irrational manner designed to create problems.

19                  So the Board thinks that it can exercise this power  
20    under 108(a)(2) to nullify statutes with practically no bars  
21    whatsoever. But that can't be what Congress intended.  
22    Congress addressed the enactment of statutes under 204(a)(5).  
23    And if you just limit the enactment of statutes to 204(a)(5),  
24    with the exception of something that interferes with the  
25    Oversight Board's own integrity, then that is a limitation

1     that allows 108(a)(2) to function and allows 204(a)(5) to  
2     function.

3                 But if you adopt the Board's way of looking at it,  
4     then 204(a)(5) won't have a purpose anymore. The Board can  
5     just say any statute impairs the purposes of PROMESA and  
6     strike it down. The Board itself concedes that 108(a) would  
7     continue to have effectiveness if you read it the way that I'm  
8     urging you to read it, Your Honor, because they've also argued  
9     in their reply, excuse me, that it would allow the Board to  
10    address resolutions, policies, and rules.

11                Now, again, we don't think that 108(a)(2) has no  
12    application to statutes, because it says right in the law  
13    itself that it does, but that's where the title concerning the  
14    Board's autonomy comes into play. If a statute would try to  
15    control the Board and interfere with its autonomy, then a  
16    statute could be struck down under 108(a)(2).

17                So, for example, Your Honor, if the government passed  
18    a law that said that the Board had to meet in a two foot by  
19    two foot by two foot box, and that was the only way that they  
20    could have their meetings, that would interfere with its  
21    functioning. It would seek to control the Board, and  
22    108(a)(2) would come into play.

23                Briefly, on Section 207, Your Honor, I heard --

24                THE COURT: But it says, defeat the purposes of the  
25    Act. It doesn't say get in the way of the Oversight Board.

1      So that --

2                    MR. SUSHON: Correct, Your Honor. But if you read  
3 that as broadly as the Board asks you to read it, then again,  
4 204(a)(5) has no role to play any longer, because the Board  
5 will say any statute impairs the purposes of PROMESA and  
6 should be struck down.

7                    And as we pointed out in our papers, Your Honor, if  
8 you look at what the Board points to here as the reasons that  
9 Act 29 violates the purposes of PROMESA, it's that it is  
10 inconsistent with the Fiscal Plan. That's their argument.  
11 Every argument they make about Act 29 boils down to the fact  
12 that it's inconsistent with the Fiscal Plan.

13                   Now, I'm over my time, Your Honor.

14                   THE COURT: You're on my clock now. You can finish.  
15 I've asked you a lot of questions.

16                   MR. SUSHON: Thank you, Your Honor.

17                   Turning to Section 207, Your Honor, again, the Board  
18 doesn't put any reasonable limitation on its powers under 207.  
19 We heard it again this morning. Its interpretation is that it  
20 applies to debt in its ordinary meaning, and that debt is an  
21 obligation. Any obligation, Your Honor.

22                   Black's Law Dictionary defines "debt" to include not  
23 only a specific sum of money due by agreement, but also  
24 nonmonetary things that one person owes another, such as goods  
25 and services. So their definition of "debt" would mean that

1 anything that the government did to obligate itself would be  
2 subject to 207 review by the Board.

20 If you use that limitation, Section 204(a)(5) is  
21 preserved and the Board has power under 207. If you adopt the  
22 Board's interpretation, Section 204(a)(5) serves no purpose  
23 anymore, Your Honor, because the Board can just say that any  
24 law is a debt, and that they didn't approve it. And then they  
25 can strike it down.

1           Unless Your Honor wants me to, I won't get into depth  
2 on our discussion of Section 204(c)(1) versus (2). If you  
3 have any questions about that, I'm happy to answer them.

4           THE COURT: No. You can go on.

5           MR. SUSHON: So, and the same goes for the operation  
6 of 204(a)(5) as to Act 29. We've laid out our arguments in  
7 our papers, Your Honor.

8           THE COURT: Yes.

9           MR. SUSHON: I won't belabor them. I will ask Your  
10 Honor -- I come back to the fact that the municipalities are  
11 in a dire position. And so if Your Honor were inclined to  
12 strike down Act 29 under Section 204(a)(5), that you not make  
13 the Order take effect for at least two weeks so that the  
14 municipalities, the Oversight Board, and the government can  
15 work together to try to come up with another solution to the  
16 problem, Your Honor, because otherwise the municipalities will  
17 immediately face a huge gap in their own budgets that they  
18 won't be able to bridge, and it will already create an even  
19 worse crisis than they're already facing.

20           Unless you have any other questions, Your Honor, I  
21 think I'm done.

22           THE COURT: Thank you, Mr. Sushon.

23           MR. SUSHON: Thank you, Your Honor.

24           MS. WAXMAN: Your Honor, may I just reply to that?

25           THE COURT: Yes.

1 MS. WAXMAN: Very briefly, Your Honor. I know we've  
2 had a long few days here.

3 Just listening to counsel today and reading the  
4 papers, it's clear that the government isn't asking to narrow  
5 the construction of PROMESA. They're asking the Court to void  
6 PROMESA. They're asking the Court to void 204(c), 108(a)(2)  
7 and 207. We obviously think that is totally inappropriate and  
8 the Court should enforce the law as written.

9 The Board is well aware of the circumstances that  
10 counsel discussed that are being faced by the municipalities,  
11 and the Board is working very hard to guide them to a place of  
12 fiscal independence and stability. And the problem with the  
13 late certifications is actually a substantive problem. It's  
14 not a procedural problem. These laws are on the books. They  
15 are being implemented as we speak. They're causing unbudgeted  
16 money to go out as we speak.

17 So a late certification isn't, again, a foot -- fault  
18 or a procedural issue. It deprives the Board of the ability  
19 to assess and analyze the law, which is what Congress mandated  
20 them to do.

21 With respect to the laws that were referenced in the  
22 December 18th letter that counsel handed up to Your Honor this  
23 morning, those laws, by the government's own admissions, are  
24 significantly inconsistent with the Fiscal Plan, and those  
25 laws are on the books. Again, money is being spent every

1      single day. That money is not accounted for in the Fiscal  
2      Plan. It's not accounted for in the budgets.

3              As a result, the Board followed PROMESA and sent a  
4      notification under 204(a)(4) telling the government to fix the  
5      law or to explain the reasons for the inconsistency. That was  
6      ignored. Again, it's a substantive issue. It's not a  
7      procedural issue. And the Board, of course, as set forth in  
8      the letter, reserves its rights under 204(a) to take action  
9      with respect to those laws. Those laws are costing millions  
10     of dollars.

11              Very briefly, Your Honor, with respect to the  
12     standard that we suggested, the arbitrary and capricious  
13     standard, we are certainly well within that standard. And I  
14     would submit respectfully, we are within any reasonable  
15     standard. The government ignored and disregarded various  
16     provisions of statute, again, 204(a), 204(c), 108(a)(2), 207.  
17     And under any reasonable assessment, that standard would be  
18     set.

19              With respect to the arguments that 204(a) is the only  
20     vehicle for Your Honor to grant the government's -- or the  
21     Board's motion, that statute applies to the Fiscal Plan.  
22     Statutes can impair and defeat PROMESA by other means, and  
23     that is why it is necessary for us to move under 108(a) and  
24     the other statutes that we moved under.

25              We determined, the Board determined that Law 29 and

1      the joint resolutions impaired and defeated PROMESA because it  
2      was inconsistent with the Fiscal Plan, but for other reasons.  
3      Those other reasons included that the Commonwealth had less  
4      money to invest in other critical programs. It impaired the  
5      Commonwealth's ability to access capital markets. It defeated  
6      fiscal responsibility because it let the municipalities off  
7      the hook.

8                    And for those reasons, the Board -- the Law 29 is not  
9      only significantly inconsistent with the Fiscal Plan, it  
10     impairs and defeats PROMESA by other means.

11                  And unless the Court has any questions, we'll rest on  
12     our earlier statements and on our papers.

13                  THE COURT: Mr. Sushon asked in the last part of his  
14     remarks that, if I do strike down Law 29, that I delay the  
15     effective date of that decree so as to permit a period of time  
16     for some negotiation. Do you have any objection to that  
17     request?

18                  MS. WAXMAN: Your Honor, may I consult with my  
19     colleagues for a moment? Thank you.

20                  Your Honor, the Board would be amenable to a two-week  
21     period to discuss the issues with counsel. We would ask,  
22     however, what we're ultimately asking for is the law to be  
23     nullified so that the past infractions can be corrected.

24                  THE COURT: Thank you.

25                  MS. WAXMAN: Thank you, Your Honor.

1                   THE COURT: I will continue this matter under  
2 advisement and issue my decision as soon as possible.

3                   MS. WAXMAN: Thank you.

4                   MR. SUSHON: Thank you, Your Honor.

5                   THE COURT: Thank you.

6                   The next matter is the Motion to Remand the Vitol  
7 litigation.

8                   MR. RAPPAPORT: Good morning, Your Honor. Lary  
9 Rappaport of Proskauer on behalf of the Oversight Board.

10                  THE COURT: Good morning, Mr. Rappaport.

11                  MR. RAPPAPORT: There's three issues that I would  
12 like to talk about today. The first issue is what I consider  
13 to be a side issue, but it's an important one. That's the  
14 question --

15                  THE COURT: Actually, can you hold on for one  
16 second --

17                  MR. RAPPAPORT: Absolutely.

18                  THE COURT: -- so that people can change places at  
19 the table?

20                  MR. RAPPAPORT: Oh, sure. Sure. I will wait for Mr.  
21 Kaplan to come out.

22                  MR. FRIEDMAN: Your Honor, can I be excused? Do you  
23 have any additional comments that may come back to AAFAF?

24                  The COURT: No.

25                  Just for the benefit of those listening, I've been

1      asked if AAFAF can be excused, and the answer is yes.

2                    MR. FRIEDMAN: Thank you, Your Honor.

3                    THE COURT: Thank you, Mr. Friedman.

4                    MR. KAPLAN: Thank you.

5                    THE COURT: Thank you.

6                    And Mr. Rappaport, we had allocated a total of 30  
7 minutes for argument on this motion. I am assuming you're  
8 splitting 15 and 15. Do you want to reserve any time for  
9 rebuttal?

10                  MR. RAPPAPORT: If I finish in less than 15 minutes,  
11 yes. Hopefully, I can.

12                  THE COURT: All right.

13                  MR. RAPPAPORT: As I started to say, there's three  
14 issues that I'd like to cover. The first issue is the  
15 question that was interjected in the opposition, and that is  
16 the question of whether or not the matter was removed on  
17 diversity jurisdiction and equitable remand does not apply.  
18 The second issue is the question of equitable remand and why  
19 we believe that, under equitable remand, this case should be  
20 remanded a second time. And then last issue is I want to  
21 address the Surreply that was filed.

22                  As the Court knows, the Commonwealth proceedings that  
23 were removed involved six fuel contracts between PREPA and  
24 Vitol. And the basic allegation of the two cases that were  
25 filed in the Commonwealth Court, one in 2009, the second in

1      2012, involves whether or not Vitol, because it had pled  
2 guilty to criminal fraud in New York, is essentially  
3 disqualified from the contracts. And so those actions seek to  
4 nullify the fuel contracts. They also have additional counts  
5 that are alleged in the alternative, including breach of  
6 contract.

7              Originally, the case, before PROMESA was enacted, was  
8 removed to the District Court. And if the Court will recall,  
9 that particular case, the District Court enforced the forum  
10 selection clauses that were in the fuel contracts that  
11 required the case to be in the Commonwealth Court.

12              The District Court found that because of those forum  
13 selection clauses, Vitol could not consent to removal and,  
14 therefore, there was no unanimity that would allow there to be  
15 removal. The First Circuit affirmed.

16              After PROMESA was passed, the case was removed again.

17              THE COURT: I am familiar with the procedural  
18 history, so --

19              MR. RAPPAPORT: Okay.

20              THE COURT: -- why don't you just cut to the chase of  
21 why it is you haven't waived the forum selection provision by  
22 bringing on a breach of contract claim in litigation in this  
23 Court against Vitol.

24              MR. RAPPAPORT: I will.

25              So the allegation that they've made as to the waiver

1      is really two-fold. One is that the claim of breach of  
2      contract is inconsistent, and the other is that by bringing  
3      the breach of contract claim, it's also a waiver of the forum  
4      selection clause.

5              The reason that it isn't is because it's an unusual  
6      situation in which the Special Claims Committee for the  
7      Oversight Board, on behalf of PREPA, brought the other action.  
8      It was an action that was brought because there is a class  
9      action that's been pending for quite a while in the District  
10     Court.

11              Vitol and various others are defendants in that  
12     action. And the basis of that action is that there were RICO  
13     violations by Vitol and others. It essentially alleges that  
14     there was a scheme in which there was a fraud perpetrated on  
15     PREPA and the claimants.

16              THE COURT: I understand that. The Special Claims  
17     Committee still represents the --

18              MR. RAPPAPORT: I understand that. But the rationale  
19     there was they were appointed for the purpose of bringing  
20     additional claims, examining whether there were claims to be  
21     brought and then bringing those claims. And there was a time  
22     bar that was approaching.

23              Vitol is not the only defendant in that case. It's  
24     -- essentially, it's a case which was brought to preserve  
25     claims in the event that in the Marrero transaction, it

1      actually was proved that there was a RICO violation. And in  
2      order to preserve those claims, they brought the case, as they  
3      could, because it was in Title III. They brought the  
4      adversary proceeding against Vitol and the other defendants,  
5      and then they immediately asked this Court to stay it and it  
6      was stayed.

7               I would contrast that with the cases that Vitol  
8      relies on in their opposition. In each of those cases, it's a  
9      situation where there's a party to a forum selection clause.  
10     They initiate an action in violation of the forum selection  
11    clause. And then in that same action, somebody asserts a  
12    claim against them.

13               And so what they want to do within one action is they  
14    want to raise the forum selection clause, both as a sword and  
15    a shield. And courts consistently have said you can't do  
16    that. That would be a waiver.

17               Here, in our situation, we have PREPA having asserted  
18    these claims consistently and enforcing the forum selection  
19    clause consistently. And because of the special  
20    circumstances, where they had to bring this action before the  
21    bar date, they went ahead and filed it against Vitol and the  
22    other defendants. Then they sought to stay it.

23               If the case goes forward in the Commonwealth  
24    proceedings -- and again, remember it was removed one day  
25    before the summary judgment motions were scheduled to be

1 filed. If that stays in the Commonwealth Court, it's going to  
2 be determined. It's going to be determined quickly.

3 Obviously, if the contracts are found to be null and  
4 void in the Commonwealth proceedings, then the contract claim  
5 is going to go away in a case that's been stayed, that's been  
6 brought by the Special Claims Committee. It's not going to go  
7 forward. But what they couldn't do was they couldn't allow  
8 the statute of limitations to pass and waive the claims  
9 without knowing what's going to happen in the Commonwealth  
10 Court.

11 THE COURT: And so there was a judgment made, in  
12 difficult and compelling legal circumstances, that a certain  
13 step needed to be taken. And any downside to that step was  
14 outweighed by the downside to not taking that step. But that  
15 step included asserting, in this Court, a claim that a  
16 contract had required be asserted in the Commonwealth Court.

17 So I'm still not seeing the exception to the general  
18 waiver principle that allows me to say, well, when that one's  
19 really important to you for another reason, and you try to  
20 kind of minimize its impact, and you are the good guy, then  
21 it's not a waiver, which is kind of what I'm hearing from you.

22 MR. RAPPAPORT: Well, I understand that, Your Honor,  
23 but we have a situation where really I don't know that the  
24 Marrero class action -- and again, remember that's the basis  
25 for what the Special Claims Committee has asserted. I don't

1 know that that could have been brought in any other court but  
2 for the Title III court.

3 And they can't allow that claim to just go by and be  
4 time barred. They really, I think, didn't have a choice but  
5 to go ahead and file that. That's a different situation than  
6 the case law, which talks about the waiver of the forum  
7 selection clause, which really is one party asserting both the  
8 forum selection clause and also bringing an affirmative action  
9 in violation of the forum selection clause in one court.

10 That's a case where you really do have a true waiver  
11 by the party. They are in the same court. They're taking  
12 opposite positions, which is inappropriate. Here, we've had  
13 these proceedings that have been going on in the Commonwealth  
14 for over ten years. And they've never wavered in asserting  
15 the forum selection clause, all the way up to the First  
16 Circuit, all the way back down, and again in front of Your  
17 Honor.

18 And I think that put into the situation where the  
19 Special Claims Committee, as the representative of PREPA, had  
20 to assert a claim, as opposed to waiving that claim, they did  
21 the right thing, and that -- that's not an intentional,  
22 knowing waiver of the forum selection clause under those  
23 circumstances.

24 THE COURT: So similarly, you might argue that a  
25 compulsory counterclaim would not be a waiver of a contractual

1 provision? I don't think I've seen any cases cited by either  
2 party that would deal with it in that instance, but it seems  
3 it's similar logic that a compulsory counterclaim outside of  
4 the contractual forum is not a waiver of the forum selection  
5 clause.

6 MR. RAPPAPORT: That would make sense, Your Honor.  
7 And again, in some of the cases that you've looked -- that  
8 they've cited in the briefs, that I know that you've looked  
9 at, I believe that one of those cases involved a counterclaim.  
10 But the difference there, which supports what Your Honor just  
11 said, the difference there was they defended against a  
12 counterclaim by asserting the forum selection clause.

13 They violated the forum selection clause in filing  
14 the claim in the court. Counterclaim is filed. And then they  
15 assert the other forum selection clause to defend against it  
16 and defeat it. So that would support Your Honor's logic. And  
17 PROMESA 106(a) requires that the action be filed in the Title  
18 III court, which is what was done.

19 So faced with that choice and making the choice where  
20 they had to bring the client and they had to file the claim in  
21 this court under PROMESA, that is not a waiver of the forum  
22 selection clause. If the Court agrees with me on that, I  
23 think that's a conclusion of the analysis, because Your Honor  
24 previously went through all the equitable factors and made the  
25 determination back in February of 2019 that all of the

1      equitable factors, except for one which was neutral, weighed  
2      in favor of equitable remand.

3              If Your Honor agrees that there's been no waiver,  
4      nothing has changed. All of those factors remain the same.  
5      The analysis remains the same. And the case should be  
6      remanded.

7              If Your Honor disagrees, we still believe, even if  
8      there were a waiver, the case should be remanded, because as I  
9      indicated a moment ago, Your Honor found that the one issue,  
10     which was the factor of whether there's a jury trial  
11     available, that was neutral. But the other factors that Your  
12     Honor went through, Your Honor found that they all weighed in  
13     favor of equity. The waiver issue only played into the  
14     prejudice. It only weighed into whether or not, as the  
15     nonremoving party, PREPA would be prejudiced if Your Honor  
16     kept the case rather than remanding it.

17              And Your Honor found it would be prejudice, and you  
18     cited as one basis of that prejudice the forum selection  
19     clause. If you removed that, it still would weigh in in favor  
20     of the remand, and it should be remanded.

21              THE COURT: But if there is no waiver and there is  
22     diversity jurisdiction, which was invoked in the Notice of  
23     Removal, how does the ability to remand equitably something  
24     that is removed only on the basis of Title III jurisdiction,  
25     transfer and impose that ability on -- removal on the basis of

1 || diversity jurisdiction under 1446 that doesn't have an  
2 || equitable remand loophole?

3 MR. RAPPAPORT: Our position, Your Honor, is that  
4 there is no diversity jurisdiction. That Congress has made  
5 very clear under PROMESA, under Section 306, that there's only  
6 two bases to remove to this Court. That this Court is given a  
7 specific grant of subject matter jurisdiction, it either  
8 arises under PROMESA, or it's related to a Title III case.  
9 Those are the only two --

10 THE COURT: I'm a visiting judge of the District of  
11 Puerto Rico. PROMESA speaks of the District Court having  
12 PROMESA related jurisdiction. It has a specific provision for  
13 a District Judge to be appointed to preside over these cases.  
14 1446 -- 1332 creates diversity jurisdiction for District  
15 Courts. 1446, I think it is, allows removal to District  
16 Courts. And I didn't see anything in Justice Roberts'  
17 Appointment Order of me that stripped me of my normal District  
18 Judge Article III ability to exercise the judicial power of  
19 the United States.

20 So I think it seems to me that Title III Court is a  
21 convenient nomenclature that we've all been using to indicate  
22 that I'm not the Bankruptcy Court for the District of Puerto  
23 Rico. But I find it difficult to follow the argument that  
24 somehow this is a more restricted part of the District Court  
25 than the District Court to which this was removed under both

1       statutes.

2                    MR. RAPPAPORT: But I think logically, Your Honor,  
3 respectfully, I think it has to. It has to be. Because first  
4 of all, PROMESA does provide the specific grant. And just  
5 like bankruptcy courts have specific grants of jurisdiction,  
6 you have a specific grant under PROMESA.

7                    The PROMESA cover sheet even, which they've completed  
8 it to bring to this Court, specifically says it can only be  
9 removed for those grounds under PROMESA. That's the only time  
10 that you use that.

11                  PROMESA specifically says that the proceedings are  
12 governed by the Bankruptcy Rules. They're not governed by the  
13 Federal Rules unless there's a specific exception.

14                  THE COURT: But related to jurisdiction is  
15 nonexclusive, and before PROMESA existed, if there was  
16 diversity jurisdiction, this case could have been and indeed  
17 was removed to this court. It was remanded by the District  
18 Court based on the forum selection clause, which brings us  
19 back around to the waiver issue.

20                  MR. RAPPAPORT: Let me answer it two ways. Number  
21 one, if Your Honor agrees that there's no waiver and the forum  
22 selection clause exists, they have the same bar that the First  
23 Circuit affirmed in Vitol one.

24                  THE COURT: Yes.

25                  MR. RAPPAPORT: And so --

1                   THE COURT: But if I find that there is a waiver --

2                   MR. RAPPAPORT: If you find that there is a waiver, I  
3 would just submit, Your Honor, it just doesn't seem right that  
4 you could have diversity jurisdiction as a basis to get into a  
5 Title III court. That would mean that anybody who has  
6 diversity jurisdiction could remove to this Court.

7                   The only hook you have is you have to do it under  
8 PROMESA. And so then you're bound by 9027, you're bound by  
9 3060, which governs remand. Those specifically say you can  
10 remand on equitable grounds. There's nothing that suggests  
11 other than -- I understand the intellectual quandary that Your  
12 Honor has stated, but there's really nothing that suggests  
13 that you have the ability to remand.

14                  You could remand under PROMESA. It was removed under  
15 PROMESA. You find that there's an equitable basis for remand.  
16 But you can't because, separate and apart from that, this  
17 Court believes that there would be diversity jurisdiction.

18                  If they thought that there was diversity jurisdiction  
19 and it was not related to PROMESA, then of course they could  
20 try to remove again to a regular -- and I'm just saying it's a  
21 nonTitle III District Court.

22                  THE COURT: Well, the Notice of Removal said United  
23 States District Court, District of Puerto Rico, 1332, and  
24 PROMESA. And, you know, as I say, related to jurisdiction  
25 is -- of proceedings is nonexclusive.

1                   So why don't they get to ask me if for some reason I  
2 decided it was unnecessary or not expedient to include it in  
3 my already large caseload in this district, to put it into the  
4 wheel and wheel it out to another judge of this district?

5                   MR. RAPPAPORT: But again, they also, in completing  
6 the cover sheet to get it into this Court and getting it  
7 assigned as an adversary proceeding, it's a different  
8 procedure than normal. You don't have your normal cover sheet  
9 with the listing of the type of case and the type of removal  
10 that you're doing.

11                   Docket number 1-1, their cover sheet specifically  
12 names the debtor. It says that it's being removed. The  
13 nature of the suit is an adversary proceeding. The Title III  
14 case in which the adversary proceeding arises is within the  
15 PREPA Title III.

16                   There's nothing that indicates that it's diversity.  
17 And I would submit, Your Honor --

18                   THE COURT: Except the Notice of Removal.

19                   MR. RAPPAPORT: But you can put in your Notice of  
20 Removal what you want to put in. That doesn't mean that the  
21 Court has subject matter jurisdiction over it.

22                   THE COURT: Okay. I hear you. Thank you.

23                   Good morning.

24                   MR. KAPLAN: Good morning, Your Honor. Alex Kaplan  
25 of Susman Godfrey on behalf of defendants, Vitol, Inc., and

1      Vitol, S.A., the defendants in the removed action.

2                    Your Honor, I wanted to start with the point --  
3 although it seems clear from the Court's questions that the  
4 Court perceived this from the papers. The case was removed on  
5 two independent and each nonexclusive grounds, diversity  
6 jurisdiction under 28 U.S.C. 1332, and jurisdiction under  
7 Title III, removal pursuant to related to or core jurisdiction  
8 under PROMESA.

9                    We removed this action to this Court, the United  
10 States District Court for the District of Puerto Rico. In the  
11 papers, the Board has said, well, this Court is a court of  
12 limited jurisdiction. Yes, of course. But the jurisdiction  
13 conferred on it by Congress includes 28 U.S.C. 1332.

14                   So as long as there is subject matter jurisdiction  
15 under 1332, and there is, there's actually no dispute that  
16 there is, the only dispute is the forum selection clause  
17 issue. This Court can exercise diversity jurisdiction. So I  
18 actually don't think the Court even needs to reach the  
19 equitable remand issues or the Title III issues. I think the  
20 Court can resolve this solely on the issue of diversity  
21 jurisdiction.

22                   And we agree, Your Honor, if the forum selection  
23 clauses were not waived, then the case should be remanded  
24 based on the prior ruling of this Court as affirmed by the  
25 First Circuit. We're not here to reargue that. But there has

1     indeed been a waiver of the forum selection clauses, and I  
2     think that's clear as a matter of law, Your Honor.

3                 They filed a suit in this court, not the court  
4     otherwise required by the forum selection clauses for breach  
5     of the same contracts at issue in the underlying action.

6                 THE COURT: They say they didn't do so willingly or  
7     with an alternative that would have permitted them to do what  
8     they had to do as the representative of the Commonwealth,  
9     because that lawsuit had to be here. And they analog -- well,  
10    they picked, they adopted my analogy to a compulsory  
11    counterclaim. And so inherent in that argument is that a  
12    waiver can only be a waiver if it's knowing, intentional and  
13    voluntary.

14                 What's your response to that?

15                 MR. KAPLAN: Yes, Your Honor. Certainly the filing  
16    of the action was intentional. It was voluntary. I don't  
17    think there's any question about that. The argument today is,  
18    well, we didn't have an alternative but to file in this Court.

19                 I will note the reference to Section 106 of PROMESA  
20    that was cited today, Your Honor, is not in the briefs.  
21    That's a new argument they're making now for the first time.  
22    And there's been no showing made that that's even accurate.

23                 They filed this action in this Court for breach of  
24    contract. Even if it were true that it had to be filed in  
25    this Court, it's not an exception to the contractual bargain

1      that was struck between these parties.

2            It may be, for the reasons set, that the Board has to  
3 consider in fulfilling other duties to other parties that they  
4 had to file in this Court. That's not our issue, Your Honor.  
5 And we don't -- that's not -- I don't have a view, a  
6 perspective on that, from the constituencies that they have to  
7 serve.

8            The point is we have a contract, and the contract is  
9 either binding on both parties or it's not. And they use that  
10 forum selection clause, Your Honor, to deny us federal forum  
11 for the claims that they choose to litigate in the local  
12 courts. But now they want to -- they have, in fact, on those  
13 very same contracts, chosen this forum, their preferred forum  
14 for these claims related to the same contract. And it can't  
15 be this heads, they win, tails, I lose position. They're  
16 either binding on the parties or they're not binding on the  
17 parties.

18            And I think, based on the cases we've cited, Your  
19 Honor, the waiver is clear as a matter of law. If you file  
20 suit in a forum that is unauthorized by the forum selection  
21 clause, that is a waiver as a matter of law. They have not  
22 cited any contrary law that would say, well, if there's not  
23 some other situation where we think we might have to file in  
24 another court, that excuses it. They've cited no cases to  
25 that effect, Your Honor.

1                   And their purported distinction in the brief, they  
2 say, well, those cases that we rely on are cases where the  
3 inconsistent action is involved in the same case. So  
4 plaintiff files suit and then tries to -- in an unauthorized  
5 forum, and then tries to assert the forum selection clause to  
6 move to dismiss a counterclaim, for example. But when the  
7 Court looks at those cases, no aspect of the rationale of  
8 those cases turns on whether or not it was in the same case.  
9 The rationale is common law of contracts, which is if you're  
10 in a material breach of an agreement, you can't enforce the  
11 agreement against the other party.

12                  It's basic principles of waiver and contract law that  
13 apply squarely here. They asserted these against us. There  
14 is no dispute, I will note for the Court, that their claims  
15 are within the scope of the forum selection clause and that  
16 the forum selection clause is mandatory. They've never  
17 disputed that, Your Honor.

18                  Their only argument is this new argument today that  
19 Section 106 required them to be filed in this Court, which  
20 it's not even clear that it's right. Although I think it's  
21 waived, it's made for the first time here today, but it's not  
22 even clear that it's right.

23                  They are pursuing breach of contract claims, property  
24 of the estate until we remove it, this against my client in  
25 the Commonwealth Courts. Why couldn't these breach of

1      contract claims be filed in the same court?

2              Indeed, the Court required before their breach by the  
3 forum selection clause. It's not a meritorious argument, Your  
4 Honor. It's sort of a last ditch effort to avoid what was  
5 otherwise, I think, a very clear waiver. And I think if the  
6 Court finds that there is a waiver of the forum selection  
7 clause, then I think there is unquestionably, diversity  
8 jurisdiction.

9              The only other argument that was made, and it was  
10 made for the first time in their Reply Brief, is timeliness  
11 with respect to diversity, Your Honor. And that argument has  
12 been waived. They reference the one-year bar in 1446 for  
13 removal based on diversity, but they raised it for the first  
14 time in their Reply Brief, Your Honor. And as a matter of  
15 law, that is waived under 28 U.S.C. 1447(c), which provides  
16 that a motion to remand a case on the basis of any defect,  
17 other than lack of subject matter jurisdiction, must be made  
18 within 30 days after the filing of the Notice under 1446(a).

19              And the law is clear, Your Honor, that the one-year  
20 limit in 1446 is not jurisdictional. It is procedural. And  
21 it is, therefore, waived if it is not asserted, pursuant to  
22 1447(c), within 30 days of the Notice of Removal.

23              We cited cases directly on that point, Your Honor.  
24 It is the *Milan* case from the Ninth Circuit and the *Arrowhead*  
25 from the Sixth Circuit at note three on page six of our

1      Surreply Brief.

2                And although the First Circuit doesn't appear to have  
3 addressed that specific question, Your Honor, the First  
4 Circuit has addressed the analogous question, which is that  
5 untimeliness under 1446 is procedural, not jurisdictional,  
6 because the First Circuit has held that the 30-day limit to  
7 remove in 1446(c)(1) is waived if not raised within 30 days.  
8 And that's the *Universal Truck and Equipment* case that we cite  
9 at page six of our Surreply Brief, Your Honor.

10              I'll just point out, on this waiver point about  
11 timeliness, I think it's quite telling we expressly argued in  
12 our opposition to the Motion to Remand that the FOMB did not  
13 raise a timeliness argument under 1446 in its Motion to  
14 Remand. They did not claim otherwise in their Reply Brief.

15              We went on and argued the consequence of that  
16 failure. We argued that by not raising timeliness under 1446  
17 in the Motion to Remand, that the FOMB had waived any  
18 timeli -- and I'm quoting from our brief, they had waived any  
19 timeliness challenge under 1446 to removal based upon  
20 diversity by not raising it in its remand -- in its motion to  
21 remand. That's ECF 10, at 10. The FOMB, likewise, did not  
22 dispute that in any respect in its Reply Brief, and indeed  
23 did not address the waiver of the one-year limit in any  
24 respect.

25              So the result, Your Honor, is that under the plain

1      language of 1447(c), the one-year limit under 1446 was waived  
2      as a matter of law, because it is a purported defect in  
3      removal, other than a defect in subject matter jurisdiction.  
4      And it was not raised in the Motion to Remand that was filed  
5      within 30 days as required by 1447. I think it's a full stop  
6      period there, Your Honor.

7              If there's a waiver of the forum selection clause,  
8      the only other possible argument is timeliness. That argument  
9      was waived. This Court has subject matter jurisdiction, and  
10     the case is properly removed to this Court.

11              Now, with respect to the civil cover sheet and Your  
12     Honor's comments, we were going to make the same suggestion,  
13     which is we were in a touch of a bind as we perceived it, Your  
14     Honor, because if we remove this case to the U.S. District  
15     Court for Puerto Rico and didn't do something to have it be a  
16     related case to Your Honor, I fear we'd be hearing the  
17     argument that we were trying to evade the Court that  
18     previously remanded us.

19              So I have a feeling we'd wind up here anyway. But if  
20     the Court's view is, as we think, proper, there is diversity  
21     jurisdiction. But the Court obviously has a lot on its plate.  
22     We certainly have no objection whatsoever to this case being  
23     -- have the Clerk assign it through its normal, random  
24     procedures to a judge in the U.S. District Court for the  
25     District of Puerto Rico.

1           There is jurisdiction in this Court, but we did file  
2 the civil cover sheet for PROMESA because the other  
3 alternative, independent nonexclusive grounds for our removal,  
4 is jurisdiction under PROMESA. So I don't think the civil  
5 cover sheet precludes diversity jurisdiction. To the  
6 contrary.

7           I just note the last sentence at the bottom of the  
8 civil cover sheet says, although the Court is using the docket  
9 of the Bankruptcy Court, that the case is under the  
10 jurisdiction of the United States District Court for the  
11 District of Puerto Rico. An Article III court that has the  
12 jurisdiction conferred on it by Congress, including 28 U.S.C.  
13 1332.

14           So if the Court concludes there's a waiver and the  
15 Court concludes any timeliness argument is waived, which it  
16 has been under 1447, the Court can -- the Court should retain  
17 jurisdiction. And the Court can adjudicate the case, or the  
18 Court can decide as a matter of administrative management,  
19 case management and the like, that the Clerk's Office can have  
20 it assigned to a different judge. We certainly have no  
21 objection to that, Your Honor.

22           I can go a touch deeper. It's a technical issue on  
23 the timeliness waiver point. I'll just say --

24           THE COURT: I don't need you to. I understand your  
25 argument.

1                   MR. KAPLAN: Okay. Thank you, Your Honor.

2                   To the extent the Court finds it's not waived, the  
3 one-year limit in 1446, as we've argued in our brief, Your  
4 Honor, there is an exception to the one-year limit. It's --  
5 Congress passed an exception in 2011 in the amendments to the  
6 statute that says, a case can be removed outside the one-year  
7 limit if the Court finds, quote, that the plaintiff has acted  
8 in bad faith in order to prevent a defendant from removing the  
9 action.

10                  And we've cited and we've briefed this, Your Honor.

11                  THE COURT: And I have read the argument.

12                  MR. KAPLAN: Okay. So even if the Court finds that  
13 the timeliness argument has not been waived, we think we'd fit  
14 comfortably within the bad faith standard, which doesn't  
15 really turn on scienter, if the Court looks at the cases here.  
16 It just turns on whether or not the plaintiff has engaged in  
17 intentional conduct defined as action or inaction to defeat  
18 removal.

19                  And I think on this record, it is clear that PREPA  
20 and FOMB have intentionally invoked the forum selection clause  
21 to deny us a federal forum so that they can litigate their  
22 claims in their preferred forum. And now, because this is  
23 their preferred forum for claims on the same contracts, they  
24 now have waived those clauses.

25                  And that is intentional conduct that has defeated

1 removal. It's very much analogous to the cases we've cited  
2 involving inconsistent conduct with respect to the amount of  
3 controversy, for example, or the joinder or dismissal of a  
4 nondiverse defendant.

5 I just want to touch on an issue that was raised  
6 today and in the briefs. And I know the Court said it's  
7 familiar with the procedural history, but just two points.  
8 They say we removed the case one day before the deadline for  
9 summary judgment motions to be filed in the local courts, and  
10 that is true. But they don't explain why that was.

11 So the waiver of the forum selection clauses occurred  
12 on November 1st of last year when they filed the action in  
13 this Court in breach of the contracts, in disregard of the  
14 forum selection clauses. They chose that date. It wasn't a  
15 date of our choosing. We didn't ask to be sued in an  
16 adversary proceeding, Your Honor.

17 We removed the case 13 days thereafter in, you know,  
18 far shorter than the normal 30 days for removal. We did it  
19 because we didn't want to be accused of having the summary  
20 judgment motions filed and, therefore, I feared we'd hear the  
21 argument we had invoked the judicial process in the local  
22 courts, and now couldn't invoke federal jurisdiction.

23 So we removed the case as quickly as we could once  
24 the grounds for removal were available, which is their waiver  
25 of the forum selection clauses. Had they not waived the

1        clauses, we wouldn't be here, Your Honor. That was the basis  
2        for our removal.

3                And counsel also said that these cases have been  
4        proceeding in the Commonwealth Court for ten years.

5        Respectfully, that is not remotely accurate. That case has a  
6        tortured procedural history, to be sure, but the first case  
7        was filed in 2009. It was immediately removed. The second  
8        case was filed in 2012. It was immediately removed.

9                They were litigated in the United States District  
10        Court for the District of Puerto Rico through 2015, all the  
11        way -- all pleading motions, all discovery, all summary  
12        judgment. The case was then remanded after a -- there was a  
13        change in judicial assignment. The case was remanded. First  
14        Circuit affirmed. We went back down to the Commonwealth  
15        Court.

16                The only thing that has happened in the Commonwealth  
17        Court, Your Honor, is an agreed motion for consolidation, the  
18        same motion for consolidation that was entered in this Court,  
19        and a deadline was set for filing of summary judgment motions.  
20        And those are, of course, the same summary judgment motions  
21        that were filed and fully briefed in this Court years ago.

22                So the notion that there is some substantial reliance  
23        interest in the Commonwealth Court is just not accurate. And  
24        in any event, they have waived that forum selection clause,  
25        and this case is now properly within this Court's diversity

1 jurisdiction.

2 I would just note, Your Honor, that independent of  
3 our diversity arguments, we have also re-moved again on the  
4 basis of the related to jurisdiction and the core jurisdiction  
5 of this Court.

6 They say in their brief that the -- and just to --  
7 they say that the filing of the avoidance action does not,  
8 quote, Alter the Court's analysis, weighing of the equities,  
9 or conclusion that equity compels remand under the equitable  
10 remand analysis.

11 It is, of course, this Court's analysis under the  
12 Santa Clara factors. I'm reticent to tell the Court how its  
13 analysis would or wouldn't be different at this point, but we  
14 just don't see how that could possibly be correct that the  
15 analysis doesn't change.

16 The Court previously held that prejudice to PREPA was  
17 a significant factor. They were in remand, given they  
18 bargained for the forum selection clauses. That's a material  
19 change in circumstance that can no longer be a basis in the  
20 equitable remand analysis.

21 We go through the other factors in our brief, Your  
22 Honor. I do think the analysis is different at this stage.  
23 And I think, given that the FOMB has expressly said that this  
24 is a case that they want to litigate only if they lose in the  
25 local court, we now have the situation where the judicial

1      economy factor cuts the other way. So you don't have  
2      duplicative, inconsistent litigation. And I think that  
3      analysis is different.

4                      There's also a timeliness issue there, Your Honor.  
5      And we've briefed that. We think under the pioneer fact -- I  
6      think under equitable estoppel, they can't assert timeliness,  
7      given that they are the reason that we're here now, as they've  
8      enforced the clause, and then they waived it.

9                      Even so, Your Honor, the Court has the discretion, we  
10     think, under the *Pioneer* factors. We've clearly satisfied the  
11     standard for excusable neglect. The Supreme Court has made  
12     clear that doesn't even require carelessness. It can just be  
13     something beyond the parties' control, which their assertion  
14     and later waiver of the forum selection causes would meet,  
15     Your Honor.

16                      So I think the Court doesn't have to reach the  
17     bankruptcy issues. It can handle this on diversity, and can  
18     either retain jurisdiction or have it assigned within this  
19     district. But if the Court does reach those issues, we think  
20     the equitable remand factors do come out a different way. And  
21     the only timeliness argument they've timely made was as to  
22     bankruptcy jurisdiction. And we think we've satisfied that in  
23     our papers, Your Honor.

24                      We'd ask the Court to deny the motion. Thank you,  
25     Your Honor.

1                   THE COURT: Thank you.

2                   So now, Counsel, on my clock, I have a question that  
3 I will ask first Mr. Rappaport to respond to, and then I'll  
4 let you respond to Mr. Rappaport's response.

5                   MR. KAPLAN: Yes, Your Honor.

6                   THE COURT: Mr. Rappaport, you ran through your clock  
7 plus before, so I want to take you up on this argument that  
8 section 106 required the assertion of this particular breach  
9 of contract claim in this Court. I don't see that in 106(a).  
10 106(a) says that any action arising out of this act shall be  
11 brought in the United States District Court, but this is not a  
12 cause of action that arises out of this act. It's a breach of  
13 contract cause of action.

14                   So why are you saying that it was required to be  
15 brought here by 106(a)?

16                   MR. RAPPAPORT: Your Honor, if you would go back and  
17 you look at the Remand Motion that we filed, and then you look  
18 at the Reply, we go through in both instances and we describe  
19 what the original claims were that were filed by the Special  
20 Claims Committee and then what the amended claims were.

21                   This originally was filed, and I don't have the exact  
22 date, but I think it was about May of 2019, when the adversary  
23 proceeding was filed. And one of the lead filings -- one of  
24 the lead claims was an allegation of a fraudulent transfer.

25                   There were many other claims there, but they were

1 claims that, my understanding is, needed to be brought under  
2 PROMESA before the Title III Court. It was then amended --

3 THE COURT: Yes.

4 MR. RAPPAPORT: -- on November 1st. And the  
5 amendment did involve the amendment to state the breach of  
6 contract claims, but it retained other claims.

7 There's an avoidance action there under -- with a  
8 544. I'm the litigator. I'm not the bankruptcy lawyer. But  
9 I believe it was under 544. And --

10 THE COURT: But why didn't --

11 MR. RAPPAPORT: -- those claims had to be brought,  
12 our understanding is, through PROMESA. They had to be brought  
13 in the Title III Court. And again, if you think about it,  
14 they necessarily are arising under and related to this Title  
15 III case for PREPA. This PREPA case.

16 THE COURT: The fraudulent transfer claims?

17 MR. RAPPAPORT: Correct. And also the amended  
18 claims, also. The breach of contract claims are one of the  
19 claims that are asserted.

20 THE COURT: And so my question for you is what is  
21 your exclusive Title III forum argument for the breach of  
22 contract claim that was added in the amendment to the  
23 Complaint?

24 MR. RAPPAPORT: It's not a stand-alone claim, Your  
25 Honor, and we can't split the causes of action. Again, going

1 back, this is derived from the Marrero class action, and it's  
2 against the defendants in that action.

3 And the nature of the action originally alleged a  
4 laundry list of claims against the fuel line defendants and  
5 against the supplier -- or, I'm sorry, the lab testing  
6 defendants. They originally included fraudulent transfer  
7 claims and other claims. And then they also included, when it  
8 was amended, the breach of contract claim. But it also kept  
9 the avoidance claims and other claims against Vitol and  
10 against others. And then there's like, you know, recovery of  
11 a ten-year transfer claim, five-year transfer claim, and so on  
12 and so forth.

13 And so once this was brought into this Court with the  
14 initial filing, again, I believe it was in May of 2019, with  
15 the fraudulent transfers, it's in front of Your Honor. It's  
16 part of this case.

17 And if they amend the Complaint, you can't make the  
18 allegations based on that transaction and against Vitol, limit  
19 them to specific ones, and then say, and now I'm going to go  
20 file another claim which has the same factual basis and allege  
21 it in a Commonwealth court. You'd be splitting causes of  
22 action. I don't believe you can do that procedurally.

23 So it was originally proper under PROMESA to file it  
24 in a Title III court. It remained proper to amend it in the  
25 Title III court under PROMESA, and that's why it was there.

1                   THE COURT: Thank you.

2                   MR. RAPPAPORT: Thank you.

3                   Can I just -- I think Mr. Kaplan may have misspoke on  
4 one issue when he said that we didn't raise this issue of  
5 timeliness of the diversity removal at all in our papers in  
6 either the Motion to Remand or the Reply. We certainly did  
7 raise it in reply. We didn't raise it in the initial motion  
8 because our position is there is no diversity jurisdiction, so  
9 we wouldn't talk about diversity and timeliness. Once they  
10 made the assertion in the opposition, we did address it.

11                  And it's also -- I believe it's on page six of the  
12 reply papers, we specifically talked about why this bad faith  
13 exception would not apply. And Your Honor may recall, we said  
14 the time ran even before PROMESA was enacted and the Oversight  
15 Board was created.

16                  So how could they have possibly acted in bad faith to  
17 prevent you filing it?

18                  THE COURT: I do recall that argument.

19                  MR. RAPPAPORT: Thank you, Your Honor.

20                  THE COURT: Mr. Kaplan.

21                  MR. KAPLAN: Yes, Your Honor. To the Court's  
22 question about 106, 106 provides claims under the Act. It  
23 doesn't cover breach of contract claims. I think that ends  
24 the inquiry.

25                  Those claims are not required to be brought in this

1 || Court. If they thought that was a --

2 THE COURT: What do you say to his claim splitting  
3 argument?

4 MR. KAPLAN: I think it's not a serious argument,  
5 Your Honor. If it were, it would be in their brief, one.  
6 Two, they've cited no law that suggests that they can't bring  
7 a breach of contract action in the local courts while they're  
8 bringing an avoidance action in this court. They've cited no  
9 law that supports that argument, Your Honor.

10 And I do want to point out, because I think it's -- I  
11 don't want it to be lost here, but the argument counsel just  
12 made was that the breach of contract claims had to be filed in  
13 this Court. They are necessarily related, is what he said, to  
14 the Title III case. Yet a year ago, Your Honor, they asked  
15 this Court to remand the case equitably on the basis that it  
16 would have no effect on the administration of the estate.

17                   They are taking inconsistent positions on issue after  
18 issue, solely for procedural advantage, to have their  
19 preferred forum in each instance, Your Honor. And again, the  
20 forum selection clauses are either binding or they're not.  
21 This case either has a necessary impact on the administration  
22 of the estate or it doesn't, Your Honor. And they can't take  
23 the position A when it suits them, and then flip a year later  
24 to position B.

25 And just on the last point, I didn't say they didn't

1 address the one year -- what I said, Your Honor, was that in  
2 their Motion to Remand, they don't address the one-year limit  
3 under 1446, which is true. And then in their -- and we said  
4 that that's a waiver in our opposition.

5 In their Reply Brief, they don't address the waiver  
6 of the 1446 argument. They address it for the first time in  
7 their Reply Brief, Your Honor.

8 Thank you very much.

9 THE COURT: Thank you.

10 Thank you, Counsel.

11 And I will take -- oh, I'm sorry. Yes, sir. In New  
12 York.

13 MR. AXELROD: -- LLP for the Special Claims  
14 Committee. I wanted to take one moment, if you'll permit me  
15 to be heard.

16 THE COURT: Yes.

17 MR. AXELROD: I just wanted to respond on the record  
18 to say --

19 THE COURT: I'm sorry. Can you hold on just one  
20 second? I'm sorry. We were -- could you start again with  
21 your name so that the transcript can be accurate? Because we  
22 didn't have you on the speaker list.

23 MR. AXELROD: Thank you, Your Honor. Tristan  
24 Axelrod, Brown Rudnick, for the Special Claims Committee.

25 I wanted to appear on record generally to support the

1 assertions made by Mr. Rappaport for the Oversight Board.  
2 Standing now, I think there's been some confusion in  
3 Mr. Kaplan's remarks regarding what was stated by the  
4 Oversight Board, by its bankruptcy counsel in a different  
5 context, versus what was alleged by the Special Claims  
6 Committee.

7 And as to the nature of the claims alleged in the  
8 fuel oil complaint, the basis for the fraudulent transfer  
9 claims are, among other things, that the -- that PREPA did  
10 not receive reasonably equivalent value in exchange for fuel  
11 transfers because low grade oil is sold at high grade prices  
12 and so on. The basis for a breach of contract action is  
13 exactly the same, that they were obligated to provide high  
14 grade fuel oil at high grade -- at a certain price. They did  
15 not provide it. They can't be extricated from one another.

16 Thank you. If Your Honor has no further questions,  
17 I'm finished.

18 THE COURT: Thank you, Mr. Axelrod.

19 And so I will maintain this under advisement and  
20 issue my decision as soon as possible. Thank you.

21 MR. KAPLAN: Thank you, Your Honor.

22 THE COURT: Thank you all, Counsel.

23 So I think there is just one remaining Agenda Item,  
24 which is the contested claim objections.

25 Hello again, Ms. Stafford.

1 MS. STAFFORD: Good morning again. These last  
2 remaining five items relate to an issue that I began to  
3 address yesterday, which is the issue of the large number of  
4 late filed responses that we have received to the objections  
5 that were originally set for the December Omnibus hearing and  
6 the January Omnibus hearing.

7 Some of those late filed responses have been  
8 adjourned either by the Court or by the debtors, and others  
9 have not. And we think, in light of, as I mentioned  
10 yesterday, some of the difficulties that claimants may have  
11 experienced during the holiday season and the January  
12 earthquake swarm, the most equitable way to deal with all of  
13 these late filed responses is to provide a brief, one-time  
14 extension of the period to respond to the December and January  
15 Omnibus objections.

16 And we're preparing a filing that we'll submit to the  
17 Court hopefully by the end of the week with respect to this.

18 THE COURT: Thank you.

19 MS. STAFFORD: And the goal of that will be, Your  
20 Honor, to set a further date certain to respond, and deal with  
21 those remaining responses at the April 22nd Omnibus hearing.  
22 And in light of that, we think it's appropriate to adjourn  
23 these remaining uncontested claim objections today.

24 THE COURT: Very well. So you will be providing a  
25 narrative explanation in your application and a proposed order

1      that would include the extended response deadline and the  
2      adjournment to April 22nd of the objections, to which there  
3      have been late filed responses. And these matters that had  
4      been queued up as contested claim objections for attention  
5      today in Agenda Items VII.1 through 5?

6                MS. STAFFORD: That's correct, Your Honor. And a  
7      notice that we'll send to all of the individuals who were  
8      subject to these claim objections.

9                THE COURT: Very well. Thank you. I will look  
10     forward to that filing, and we won't address these contested  
11     claim objections further today.

12               MS. STAFFORD: Thank you very much, Your Honor.

13               THE COURT: Thank you.

14               That brings me, as far as I know, to the end of the  
15     Agenda. I am not seeing anyone trying to contradict me on  
16     that. So once again, everyone, thank you so much for your  
17     work and for your advocacy and for your engaging with me on my  
18     questions as we work through these matters.

19               The next scheduled hearing date is the preliminary  
20     hearing in connection with the revenue bond lift stay motions,  
21     which is scheduled for April 2nd, 2020, in New York, with  
22     video connection to San Juan.

23               And I once again thank very sincerely the court staff  
24     here in Puerto Rico, in New York, and in Boston for their  
25     superb ongoing work in supporting these matters, and in

1      particular, in conducting these hearings.

2              I wish everyone safe travels and good health, and  
3      look forward to seeing you all the next time we encounter each  
4      other.

5              We are adjourned.

6              (At 11:14 AM, proceedings concluded.)

7              \*           \*           \*

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1 U.S. DISTRICT COURT )

2 DISTRICT OF PUERTO RICO)

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4 I certify that this transcript consisting of 76 pages is  
5 a true and accurate transcription to the best of my ability of  
6 the proceedings in this case before the Honorable United  
7 States District Court Judge Laura Taylor Swain, and the  
8 Honorable United States Magistrate Judge Judith Gail Dein on  
9 March 5, 2020.

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13 S/ Amy Walker

14 Amy Walker, CSR 3799

15 Official Court Reporter

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